Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ESTOCK CORPORATION, N.V., and LOUIS A. MOVITZ, as Trustee,

Petitioners,

v.

FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Amendment allows appellate courts to invalidate jury verdicts by replacing the jury verdict with the appellate court's own view of economic rationality.

LIST OF PARTIES

Pursuant to Rules 14.1(b) and 29.6, the following list identifies all of the parties to the appellate proceeding in the United States Court of Appeals for the Seventh Circuit:

Louis A. Movitz, as Trustee, and Estock Corporation, N.V., petitioners here, were the plaintiffs and appellees below. Estock Corporation has no parent nor subsidiary.

The First National Bank of Chicago, respondent here, was the defendant and appellant below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Estock Corporation, N.V., and Louis A. Movitz, as Trustee, respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. In a particularly pernicious form of judicial activism, the court of appeals' decision denied petitioners their Seventh Amendment right to a jury trial by invalidating a jury verdict and entering judgment outright, in conflict with the constitutionally-mandated standard of review, in order to advance the court's own view of economic rationality.

The court of appeals' decision conflicts with decisions of this Court and other courts of appeals and generates confusion regarding the standards governing appellate review of jury verdicts. The decision represents an improper intrusion into the province of the jury. Such inappropriate judicial activism, coming from the court of appeals which already has the Nation's highest rate of reversals in private civil actions, calls for an exercise of this Court's supervisory jurisdiction.

OPINIONS BELOW

The court of appeals' opinion, reported at 148 F.3d 760 (7th Cir. 1998), is set forth in the Appendix at App. 1-11. The judgment entered on the jury verdict by the United States District Court for the Northern District of Illinois, Eastern Division, is set forth at App. 12. The district court's orders denying respondent's motion and renewed motion for judgment as a matter of law are set forth at App. 13 and App. 14-15 respectively. The court

of appeals' order denying rehearing and rehearing *en banc* is set forth at App. 16-17.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on June 23, 1998, setting aside the jury's verdict in favor of petitioner Estock. On July 21, 1998, petitioners filed a timely petition for rehearing and suggestion of rehearing *en banc*, which the court of appeals denied on August 25, 1998. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provision:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST., Amend. VII.

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Seventh Circuit, setting aside a jury verdict in favor of petitioner Estock Corporation for breach of contract and breach of fiduciary duty, and entering judgment outright for respondent.

A. The Jury Finding of Liability

Petitioner Estock and its sole shareholder Dr. Jawad Hashim (who has been succeeded in the litigation by petitioner Movitz) brought this diversity action against respondent First National Bank of Chicago, alleging breach of contract and breach of fiduciary duty based on the Bank's misconduct in evaluating, buying, and managing a Houston, Texas office building purchased as an investment for petitioners.[1] At trial, the jury returned a verdict for Estock for $3.28 million (consisting mostly of Estock's undisputed $2,922,616 in out-of-pocket expenses), based on the Bank's violation of its contractual and fiduciary obligations.

1. Respondent's misconduct

Petitioners proved to the jury that respondent Bank, acting as a fiduciary, committed a series of fundamental errors in purchasing and managing a Houston, Texas office building on petitioners' behalf. The Bank's pre-purchase misconduct included, *inter alia*: (1) Failing to obtain a structural analysis it had promised to

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[1] While this litigation was pending, Hashim filed for bankruptcy. Petitioner Movitz, Hashim's trustee in bankruptcy, was substituted as a plaintiff. During the trial, petitioner Movitz' claims were dismissed pursuant to *Fed. R. Civ. P.* 50(a), on the ground that damages would accrue to petitioner Estock, not to Hashim personally. *Tr.* 2140-42. In the court of appeals, Movitz sought reinstatement of his claims as a protective measure, if that court were to remand for further proceedings. *See* Petitioners' C.A. Brief at 27-28, 50. Movitz similarly is named as a petitioner here in order to preserve his rights in the event of any further proceedings.

obtain, which would have revealed severe structural problems; (2) Ignoring pre-purchase warnings of serious problems with the building's air conditioning system; and (3) Issuing wildly erroneous pre-purchase financial reports about the building, egregiously misstating the available data by as much as 300%.[2]

Petitioners proved to the jury that, as a result of these errors, the Bank abused its fiduciary authority to invest their money in a severely flawed building, and then failed to address or correct the building's physical and financial problems after the purchase. The building's woes included, but were not limited to, severe foundation problems (such as shifting and cracking walls, shattered windows, and leaks so bad that whole areas of the building had to be hidden from prospective tenants); severe air-conditioning problems (a competitive disaster in Houston's climate), which at one point led to a threatened rent strike; and cash flow which, even at 100% occupancy, was barely break-even (in a time of double-digit interest rates). *See* Petitioners' C.A. Brief at 13-16, 17-18, 19-20.

By the time the mortgage lender foreclosed in 1985, the Bank's misconduct had cost Estock $2.9 million in actual, direct out-of-pocket expenses (its $2.2 million initial investment and $700,000 in additional outlays), as well as the loss of any possibility of revenue from

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[2] *See* Petitioners' C.A. Brief at 5-17. For example, shortly before the purchase the Bank's reports, used by it to recommend the purchase, showed first-year cash flow of $134,876. Six weeks after the purchase, the Bank dropped that to $35,810—using the same, readily-available information. *Id.* at 15. (The actual result for the year, $17,392, was even worse. *Id.*)

the funds paid for the fatally flawed building selected by the Bank. *See* Petitioners' C.A. Brief at 21-23.

2. *The Jury's Resolution Of Disputed Factual Issues*

Among the issues that were directly and squarely tried and presented to the jury was the causation of petitioners' losses—whether, despite the Bank's blatant mistakes, the losses were caused, as the Bank contended, simply by a downturn in the Houston real estate market, or whether, as petitioners' economic expert and other witnesses testified, the losses were caused by the singular problems of the building itself. At the conclusion of plaintiffs' case, the Bank moved for judgment as a matter of law. The experienced district court[3] denied the motion as to Estock, stating that there was a "legally sufficient evidentiary basis for a reasonable jury to find for" Estock. *Tr.* 2141; App. 13.

At the request of respondent Bank, the jury was explicitly instructed that, if it concluded that the Houston real estate market downturn was the cause of Estock's loss, it should *not* find for Estock (*Tr.* 3057):

> . . . if you determine that the decline in plaintiffs' investment would have occurred despite any allegedly wrongful conduct by The First National Bank of Chicago, plaintiff has failed to prove that the First National Bank of Chicago proximately caused its loss.

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[3] At the time of trial, Judge Norgle had 13 years' experience as a United States District Judge, preceded by a further 10 years' experience as an Illinois state court trial judge.

The jury was also instructed, again at the Bank's request, that Estock must "prove loss causation," *i.e.*, "[Estock] must prove that it would not have suffered losses if the facts about its investment were what it believed them to be." *Tr.* 3057-58.

The evidence at trial included testimony and exhibits establishing, *inter alia*, that the actual return on petitioner Estock's flawed building was consistently far lower than the return for what the Bank's own expert claimed was the median suburban Houston office building, including during the years of the downturn in Houston's real estate market.[4]

Based on the evidence before it, the jury rejected the respondent Bank's claim to a form of immunity for its misconduct based on a general downturn in the Houston real estate market. Instead, acting under the jury instructions the Bank itself requested, the jury unquestionably found that Estock's losses were caused by the Bank's misconduct, and that the Bank accordingly was liable for those losses.

Following the jury verdict, the district court denied the Bank's motion for judgment as a matter of law and for a new trial. The court again explained that the verdict lay within the constitutionally protected province of the jury: "After careful review of the pleadings

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[4] The Bank's expert presented testimony regarding what he asserted was the "median" building. In response, Estock's expert showed that when the figures used by the Bank's expert were corrected and properly applied, during 1981-85, including the period of the market downturn, *(i)* the "median" building earned over $530,000, but *(ii)* Estock's building *lost* $824,000 for the same period. *Tr.* 2925-38; Ex. PK 60. See page 9 n.6 *infra*.

and the trial evidence, the court finds that there was sufficient evidence presented to support the jury's verdict, in its entirety." App. 14-15.

B. The Court of Appeals' Invalidation of the Jury Verdict

Respondent Bank appealed the judgment, arguing that the jury verdict should be invalidated on the ground that the Bank's fiduciary misconduct did not cause Estock's losses. In an opinion by Chief Judge Posner, the court of appeals rejected and invalidated the jury verdict and itself entered judgment for the Bank. App. 1-11.

Rather than recognizing an appellate court's responsibility to draw all reasonable inferences in favor of the jury's verdict, the court of appeals drew inferences *against* the jury verdict and substituted its own model of economic rationality for the jury's findings. The court of appeals' invalidation of the jury verdict is explicitly based on the court's own conjecture about possible economic theories for petitioner's losses. *See, e.g.*, App. 10 (Estock "*may* not have lost this money as a result of the bank's misconduct but only as a result of the collapse of the Houston real estate market") (emphasis added); *id.*, 8 ("By 1985, many office buildings in the Houston area had lost value. *Perhaps some of these had structural defects too . . .*") (emphasis added); *id.*, 7-8 ("The market crash that wiped out Estock's investment was city-wide and *could easily have* wiped out an alternative investment . . . in Houston had the deal negotiated by the bank fallen through") (emphasis added); *id.*, 8 ("What is even *more likely* is that Estock

would have bought the same building, only at a lower price . . .") (emphasis added); *id.*, 6 ("Had Hashim diversified his investments, he would not have taken such a big hit when the Houston real estate market collapsed"); *id.*, 9-10 ("*Suppose* that *on the assumption* of a purchase price of $4 million Estock would have lost only $2.3 million in the crash. Then the damages recoverable in this suit would be $1 million . . .") (emphasis added); *id.*, 9 ("Had the collapse been generally foreseen, the building could not have been sold for any more in 1982 than in 1985—who would have bought it for more, knowing what lay ahead?").[5]

Although the court included a glancing reference to a "reasonable jury," App. 9, it never referred to an appellate court's Seventh Amendment obligation to draw reasonable inferences in favor of the jury verdict. To the contrary, its analysis and decision are based on a standard in which an appellate court is not bound by any such obligation, but rather is guided only by its own personal assessment of economic rationality. So zealous was the court to impart those views that, in

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[5] Equally contrary to reasonable inferences, the court of appeals also chose to assume that the only adverse consequence of the building's defects was the raw cost of repairing them. *See* App. 8. That overlooks, of course, the fact that the Bank, managing the building, wholly *failed* to repair the defects—allowing them to depress the building's performance, and thus cause damage far in excess of their cost. The court also chose to speculate, again contrary to reasonable inference, that the Bank had no choice but to buy the building (so that the damage issue was not good building *vs.* bad one, but only *this* building repaired *vs.* unrepaired). *See id.* That overlooks the fact that *this* building was not economically viable from the very outset (well *before* the market downturn), even at its initial full occupancy. *See* Petitioners' C.A. Brief at 15-16, 17-20.

addition to ignoring its Seventh Amendment obligations, it also ignored its duty under *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), to follow Illinois burden-of-proof rules in this diversity case.[6]

Petitioners filed a timely petition for rehearing and suggestion of rehearing *en banc*. Petitioners argued that the court of appeals had turned the standard of appellate review for jury verdicts on its head, drawing inferences *against* the jury verdict and requiring a prevailing plaintiff to prove, to the appellate court, a negative on all possible scenarios and economic assumptions. *See* Petitioners' C.A. *En Banc* Petition at 9-10. Petitioners also argued that the panel had failed to follow Illinois law regarding loss causation and the burden of proof. *See id.* at 10-15; *see also* note 6 below. On August 25, 1998, the court of appeals denied the petition.

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[6] As even the Bank conceded below, *see* Respondent's C.A. Reply Brief at 5, under Illinois law, once a breach of contract or fiduciary duty is shown which "materially *contributes*" to a loss, the burden falls on *defendant* to prove that the same loss would have occurred even absent its wrongful conduct. *Frangos v. United States Fid. & Guar. Co.*, 312 N.E.2d 688, 690 (Ill.App.Ct. 1974); *O'Neil v. Continental Bank*, 662 N.E.2d 489, 496-97 (Ill.App.Ct. 1996). See also *In re Busby's Estate*, 6 N.E.2d 451, 459 (Ill.App.Ct. 1937) (rejecting claim by respondent Bank that Depression excused liability for fiduciary duty breach: "The current depression . . . has not given any immunity bath to . . . negligent executors"); *Merchants Nat. Bank of Aurora v. Frazier*, 67 N.E.2d 611, 619 (Ill.App.Ct. 1946) (same). The court of appeals ignored this, instead didactically invoking *Gorris v. Scott*, (1874) 9 L.R. Exchequer 125, a case about sheep which has never been cited by an Illinois court and, even in England, is ordinarily confined to particular statutory situations. *See* App. 4-5.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision represents a drastic departure from the constitutionally-mandated standard for reviewing jury verdicts. It conflicts with fundamental decisions of this Court and of other circuits regarding that constitutionally-mandated standard of review.

Given the primacy and importance of the Seventh Amendment limitations on appellate review of jury verdicts, from time to time this Court finds it necessary to address cases in which courts of appeals have overlooked such established standards in the interest of advancing their own views. *See, e.g., Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954), *and see* pages 17-18 *infra*. This is such a case. The court of appeals' decision places litigants' jury trial rights in jeopardy. The Seventh Circuit Court of Appeals already has the conspicuous distinction of leading the Nation in reversing civil trial court judgments.[7] If allowed to stand, the decision below will invite disappointed litigants to seek similar *de novo* appellate review of jury verdicts, in contravention of the Seventh Amendment.

Because the decision below is so clearly erroneous and inconsistent with the decisions of this Court regarding

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[7] According to the Administrative Office of the United States Courts, for the twelve months ended June 30, 1998 the Seventh Circuit reversed in 17.3% of all private civil appeals. That is the highest such reversal rate of any court of appeals. It is nearly half again as high as the nationwide average (12.2%), and one-fourth or more higher than the rate in nine of the other 11 courts of appeals. It is more than twice as high as the First, Second, and District of Columbia Circuits (5.2%, 4.2%, and 8.7% respectively).

the appropriate standard of review for jury verdicts, petitioners request that this Court grant certiorari and summarily reverse the court of appeals' decision. At the very least, in light of the importance of the issue presented for protection of a basic constitutional right and the administration of justice, the case warrants review and consideration by this Court.

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH SETTLED PRINCIPLES REGARDING THE CONSTITUTIONALLY-MANDATED STANDARD GOVERNING APPELLATE REVIEW OF JURY VERDICTS.

The fundamental issues raised by the court of appeals' decision are readily apparent.

First, it is settled that the Seventh Amendment allows a federal appellate court to invalidate a jury verdict only if no rational trier of fact could have found for the prevailing party on the challenged aspects of the claim. In performing this sensitive duty, moreover, the reviewing court must view the evidence in the light most favorable to the party that prevailed before the jury, and must draw all reasonable inferences in favor of the jury verdict.

Second, the court of appeals' decision drastically departs from these principles. The court of appeals never recognized its obligation to draw all reasonable inferences in favor of the jury verdict, and instead adopted an analysis in which inferences are drawn *against* the jury verdict. Thus, the court of appeals' decision openly substitutes conjecture and speculation for the jury

verdict, and improperly bases appellate review on the appellate court's own preferred model of what it considers economically desirable behavior. The court of appeals' decision thus conflicts with decisions of this Court and with other courts of appeals.

A. The Seventh Amendment Requires that an Appellate Court Reviewing a Civil Jury Verdict Must View the Evidence in the Light Most Favorable to the Prevailing Party, and Must Draw All Reasonable Inferences in Favor of that Party.

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." As this Court has repeatedly recognized, that constitutional command "controls the allocation of authority to review verdicts," *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996). *See also id.* at 469 (SCALIA, J., dissenting) (noting that it was precisely the perceived evil of appellate review of jury verdicts for factual errors which "gave birth to the Reexamination Clause of the Seventh Amendment"); *and see, e.g., Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 52 (1954) ("Appellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment"); *The Justices v. Murray*, 76 U.S. 274, 278 (1869).

In allocating this authority, the Seventh Amendment commands a reviewing court to respect a jury's findings. *See, e.g., Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980) ("'The Seventh Amendment bars

appellate review of facts found by a jury in actions at common law'"). Accordingly, the jury verdict in favor of Estock may be disturbed on appeal only if no reasonable juror could possibly have found that Estock established the challenged aspects of its claim. *See, e.g., Delli Santi v. CNA Ins. Companies,* 88 F.3d 192, 203 (3d Cir. 1996); *Star Financial Services, Inc. v. Aastar Mortgage Corp.*, 89 F.3d 5, 8 (1st Cir. 1996); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 889 (2d Cir. 1988).

A critically important element of this constitutional constraint on federal courts is deference. The question is not what the reviewing court finds most reasonable, but what a reasonable juror might have concluded, *even if the reviewing court would disagree* with that judgment. *See Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110 (1959) (reviewing court may not "reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable") (internal quotation marks omitted).

Therefore, in determining whether a reasonable juror could have found in favor of a party, the reviewing court must view the evidence in the light most favorable to the party that prevailed before the jury—*and must draw all reasonable inferences in favor of the party that prevailed before the jury. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). In addition to this Court's decisions, numerous decisions of other courts of

appeals reflect these principles of deference.[8] Indeed, these principles are so basic to appellate review that they can accurately be described as axiomatic.

B. The Court of Appeals Drastically Departed from These Settled Seventh Amendment Principles, Drawing Inferences Against the Jury's Verdict and Substituting Speculation and Conjecture for the Jury's Findings.

Rather than applying these well-settled principles, as the Constitution commands, the court of appeals employed a radically different standard of review in which a reviewing court may draw inferences *against* a jury's verdict and replace the jury's findings with speculation, conjecture, and the court's own view of economically desirable behavior. As a result, the court of appeals' decision, if allowed to stand, will create conflict and confusion regarding the appropriate standards for reviewing jury verdicts, inviting litigants in the Seventh Circuit and other courts of appeals to seek *de novo*

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[8] *See, e.g., Star Financial Services, Inc. v. Aastar Mortgage Corp.*, 89 F.3d 5, 8 (1st Cir. 1996); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 889 (2d Cir. 1988); *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 203 (3d Cir. 1996); *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996); *Mosley v. Excel Corp.*, 109 F.3d 1006, 1009 (5th Cir. 1997); *Lewis v. Sears, Roebuck & Co.*, 845 F.2d 624, 632 (6th Cir. 1988); *Mears v. Nationwide Mutual Ins. Co.*, 91 F.3d 1118, 1121-22 (8th Cir. 1996); *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985); *Wheeler v. Koch Gathering Systems*, 131 F.3d 898, 906 (10th Cir. 1997); *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.3d 1453, 1455 (11th Cir. 1991); *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995).

review of jury verdicts. Such non-deferential review and substitution of a court's model of economic rationality for the jury's findings plainly violate the Seventh Amendment.

As noted, the court of appeals has a dramatically high percentage of civil case reversals. *See* page 10 n.7 *supra*. Certainly this case is an unfortunate paradigm of that judicial aggressiveness. Here, the court of appeals invalidated the jury's verdict because, in its view, Estock "*may not* have lost this money as a result of the bank's misconduct but only as a result of the collapse of the Houston real estate market." App. 10. By the end of that same paragraph, that speculation is transmuted into the flat assertion—unsupported by anything other than the court's own speculation, and diametrically opposed to the jury's finding—that Estock's loss *was* "caused by extraneous economic conditions." App. 11.

By its own terms, the court's conclusion, and its standard of review, were openly based, not upon a review of the evidence in the light most favorable to Estock, drawing all reasonable inferences in favor of the verdict, but rather on the court's speculation and conjecture *contrary* to the verdict. *See* pages 7-8 *supra* and page 16 n.9 *infra*; *see also, e.g.*, App. 8 ("it is entirely implausible and unproven that defects which could have been repaired for under $100,000 caused the value of Estock's building to plunge from $5.1 million to $2.8 million"); App. 8-9 ("But the correction of the overestimate would have depressed the sale price; so a sale, with all the transaction costs entailed thereby, would not—except in hindsight—have benefited Estock").

On its face, this aggressive and intrusive judicial approach contravenes the settled, constitutionally-mandated principles of deference to jury verdicts. Here, even the Bank did not complain of the district court's jury instructions, which told the jury to undertake exactly the inquiry the court of appeals said was necessary. *See* pages 5-6 *supra*. "We must assume that the jury followed the court's instructions." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). Thus, it was not for the court of appeals to second-guess what the jury itself specifically did.

The court of appeals' contrary standard, moreover, places the burden on judicial review of a jury verdict precisely backwards: it is the plaintiff, which received the jury verdict, which then must prove the negative, and conclusively eliminate all other possible scenarios thought up by the court's far-ranging speculation.[9] If

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[9] The court of appeals' speculation is clearly inconsistent with the evidence submitted to the jury and reasonable inferences drawn from that evidence. Among many other things, *see* Petitioners' C.A. Brief at 5-20, the evidence clearly showed, as noted at page 6 *supra*, that the building at issue performed *far worse* than the median suburban Houston office building, *including during the "collapse" of the real estate market emphasized by the panel*. *Tr.* 2925-38; Ex. PK 60; *see also, e.g.*, *Tr.* 1629-30 (building's problems "definitely" impaired its ability to survive in the marketplace), *Tr.* 2011-12, 2015-16, 2031, 2034 (because of its problems, building could not perform). It was clearly not "implausible" for the jury to infer that the poor performance was the result of the building's air conditioning and structural problems (such as cracking and shifting walls, visible sagging of the building's corner, broken windows, roof leaks, and misaligned door frames), which respondent Bank carelessly failed to discover or repair. The Bank's own experts

(continued...)

allowed to stand, the court of appeals' decision will create confusion in the Seventh Circuit and in other circuits regarding the constitutionally-mandated standards for reviewing jury verdicts. Certiorari should, therefore, be granted to clarify that the Seventh Amendment does not permit an appellate court to invalidate a jury verdict on such grounds.

In short, the court of appeals' decision creates an entirely new standard for reviewing jury verdicts, whereby a reviewing court may draw inferences against a jury verdict and invalidate that verdict on the basis of speculation, conjecture, and the court's own interpretation of the evidence and assumptions of economic rationality. The Seventh Amendment clearly prohibits the judiciary from treating jury verdicts with such disregard.

II.

THE COURT OF APPEALS' DECISION IS SO CLEARLY ERRONEOUS AND INCONSISTENT WITH FUNDAMENTAL SEVENTH AMENDMENT PRINCIPLES THAT THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THAT DECISION.

Because the court of appeals' decision is so clearly erroneous and inconsistent with fundamental Seventh Amendment principles established by this Court, this Court should grant certiorari and summarily reverse that decision. *See, e.g., Massachusetts v. Upton*, 466 U.S. 727 (1984) (summary reversal based on court of

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[9] (...continued)
admitted that such problems would impair the building's viability. *See, e.g., Tr.* 2278-80, 2702-03, 2705-06, 2720-25.

appeals' conflict with clearly established standards); *Florida Dep't of Health & Rehabilitative Svcs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (same). In light of the fundamental importance of the Seventh Amendment jury trial right, this Court has often reversed summarily where, as here, appellate courts invalidate jury verdicts in conflict with established restraints on federal judicial review of jury verdicts. *See, e.g., Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (summarily reversing court of appeals' overturning of jury verdict); *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954) (same); *Union Trust Co. v. Eastern Air Lines*, 350 U.S. 907 (1956), *mod. on rhrg.*, 350 U.S. 962 (1956) (same); *see also Meeks v. Georgia Southern & Florida Ry. Co.*, 377 U.S. 405 (1964) (same, where invalidation of jury verdict conflicted with established FELA standards); *Harris v. Pennsylvania R.R. Co.*, 361 U.S. 15 (1959) (same); *Moore v. Terminal R.R. Ass'n*, 358 U.S. 31 (1958) (same).

Here as well, the Court should grant certiorari and enter a summary reversal to prevent the court of appeals' flagrant violation of settled Seventh Amendment principles. At the very least, in light of the importance of the issue presented, petitioners request that the Court grant certiorari to review the court of appeals' decision.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for a writ of certiorari and summarily reverse the decision of the court below.

Dated: November 23, 1998.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 97-3761 and 97-3818

LOUIS A. MOVITZ, as Trustee,
and ESTOCK CORPORATION, N.V.,

Plaintiffs-Appellees, Cross-Appellants,

v.

FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 2696—**Charles R. Norgle, Sr.**, *Judge.*

ARGUED MAY 26, 1998—DECIDED JUNE 23, 1998

Before POSNER, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges.*

POSNER, *Chief Judge.* A jury awarded Estock Corporation some $3.3 million in damages in a diversity suit against the First National Bank of Chicago for breach of contract and of fiduciary duty. The bank appeals, and Estock cross-appeals seeking the addition of prejudgment interest to the judgment. The principal ground of appeal, and the only one we shall have to consider, is that Estock failed to prove that the bank's conduct was the "cause" of its loss

within the meaning that the law attaches to this term when a plaintiff is seeking an award of damages. The applicable law, the parties agree, is that of Illinois.

Back in 1980, Jawad Hashim, a foreign businessman, told an executive of the First National Bank that he wanted to invest $2 million in U.S. real estate. The bank's real estate acquisition department located an office building in a Houston suburb and took Hashim on a tour of it and he liked it well enough. He created Estock to be the vehicle for his investment in the building, and Estock in turn signed an agreement with the bank under which the bank was to evaluate, buy (for Estock), and operate and maintain the building. Movitz, the other plaintiff, is Hashim's trustee in bankruptcy. His claims were dismissed, and he has appealed the dismissal, but he concedes that the appeal is moot unless we order a new trial; we are not going to do that and so we can ignore him and treat Estock as the sole plaintiff.

The bank bought the building for Estock for $5.1 million, with Estock putting up $2.2 million in cash and assuming a $2.9 million mortgage. The purchase turned out to be a disaster. In April of 1984 Estock transferred the operation of the building to another bank, which could not stem the losses despite Estock's investing another $800,000; in June of the following year the mortgagee foreclosed and Estock's entire investment, minus some trivial earnings ($50,000), was lost. The jury awarded Estock its total out-of-pocket loss and more, but the more may represent the opportunity cost of the investment—the return that Estock would have received had it invested the money otherwise. Since the purpose of an award of damages is to put the plaintiff in the position that he would have occupied but for the wrongful act of the defendant, there is no objection in principle to awarding a plaintiff not only lost principal but lost profit, though such awards are frequently denied as too speculative. See, e.g., *Doll v. Bernard*, 578 N.E.2d 1053, 1057 (Ill. App. 1991); *Messer v. E.F. Hutton & Co.*, 833 F.2d 909, 922-23 (11th Cir. 1987). Whether it was too specu-

lative in this case is another issue that we won't have to resolve.

We may assume that the agreement implicitly required the bank to exercise due care in the performance of the duties that the agreement imposed on it, *Index Futures Group, Inc. v. Ross*, 557 N.E.2d 344, 348 (Ill. App. 1990); *Outboard Marine Corp. v. Babcock Industries, Inc.*, 106 F.3d 182, 185 (7th Cir. 1997); *Spartech Corp. v. Opper*, 890 F.2d 949, 951-52 (7th Cir. 1989), and that it failed to do so. According to testimony that a reasonable jury could credit, the bank carelessly failed to check in advance of the purchase the building's structural soundness and as a result failed to discover that the building had not been properly designed to prevent its foundation from settling and that the air conditioning ducts could not deliver enough cool air to keep the tenants comfortable—a serious problem in Houston's climate. A reasonable jury could also find that the bank carelessly miscalculated the net income that the building would generate. Even though it had complete information about the building's rental income in the near term because the building was fully occupied, the bank managed to overestimate the net cash flow in the very first year of Estock's ownership by a factor of almost four ($135,000 versus $35,000).

In the following year, 1982, the Houston office market began to turn down, yet the bank did not consider selling the building. By the end of 1983, with the market now "terribly ill," the building was more than 30 percent vacant; it was almost 40 percent vacant when the building was turned over to new management a few months later. Although the foundation and air conditioning problems could have been corrected at a total cost of less than $100,000, they had not been (though they were later). As a result there was rising tenant dissatisfaction and even a threat (never carried out, though) of a tenants' strike.

Had the bank been more careful at the outset and discovered then that the building was less profitable than it

appeared to be and that it required significant repairs, the deal might never have gone through: the bank might not have recommended the purchase, Hashim might have gotten cold feet, or Estock might have offered the owner of the building a lower price which the owner would not have accepted. So had it not been for the bank's negligence in evaluating the property, Estock might indeed be $3.3 million to the good. Of course, this depends on what it would have done with the money had the deal fallen through. Had it invested it in another office building in Houston, the money might well have been lost, given what happened to the market. But if instead the money had been invested in an office building or other commercial property in an area that did not experience the disastrous downturn that the Houston real estate market experienced in the early 1980s (as a result of overbuilding and a sharp decline in the price of oil that hurt business in the city), probably the money would not have been lost; its investment might even, as we noted earlier, have generated a significant profit. At any rate, there was enough evidence (though only barely, as we shall see later) that the bank's negligence was a "but for" cause of Estock's losing its investment to allow the jury to find that it was.

As Estock reluctantly concedes, however, a finding of "but for" causation (what philosophers call a "necessary condition") is not a sufficient basis for imposing legal liability. If it were, then the estates of Santa Anna, Sam Houston, or Columbus might also be liable to Estock, plus the inventor of the elevator or the steel girder, or Hashim's parents, or OPEC, which brought about the increase in oil prices that fueled Houston's real estate boom in the 1970s, a boom that made investing in that real estate seem so attractive a prospect in 1980.

The principle that but-for causation is not enough to establish civil liability for carelessness or other wrongdoing is pertinently illustrated by the famous old English case of *Gorris v. Scott*, 9 L.R.-Exchequer 125 (1874). The plaintiff's

sheep were being transported on a ship owned by the defendant. A storm arose and the sheep were swept overboard to a watery death. The defendant had failed to equip the ship with pens for the sheep, as he was required to do in order to prevent the spread of disease among the animals. Had he complied with his duty the sheep would have been saved. And so the violation of the duty was a "but for" cause of their loss. Yet the plaintiff was not allowed to recover any damages. The loss of the sheep was a consequence, but not a foreseeable consequence, of the violation of a legal duty, because the duty was to take precautions against a different kind of loss from the one that materialized. See also *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir. 1984); *Restatement (Second) of Torts* § 281, comments e and f and illustration 3 (1965); Robert E. Keeton, *Legal Cause in the Law of Torts* 3-11 (1963). It is the same here. The bank had no contractual or other legal duty to build pens that would prevent the Houston real estate market from diving overboard. The care that the bank was contractually required to take in advising Estock with regard to the purchase of the office building was not intended to prophesy or avert market fluctuations but to make sure that the building was a sound purchase under current market conditions.

The distinction between "but for" causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between "transaction causation" and "loss causation." E.g., *Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 535 (7th Cir. 1998); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990); *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 931 (7th Cir. 1988); *Robbins v. Kroger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997). Suppose that an issuer of common stock misrepresents the qualifications or background of its principals, and if it had

been truthful the plaintiff would not have bought any of the stock. The price of the stock then plummets, not because the truth is discovered but because of a collapse of the market for the issuer's product wholly beyond the issuer's control. There is "transaction causation," because the plaintiff would not have bought the stock, and so would not have sustained the loss, had the defendant been truthful, but there is no "loss causation," because the kind of loss that occurred was not the kind that the disclosure requirement that the defendant violated was intended to prevent. To hold the defendant liable for the loss would produce overdeterrence by making him an insurer against conditions outside his control. Of course, one could take a very hard line and argue that the defendant had only himself to blame—had he told the truth he would have no liability. But the law rejects this argument, perhaps believing that it is unrealistic to suppose that potential defendants have such complete control over their actions (realistically, the actions of their employees and other agents) that they won't worry about, and so overprotect against (which is what we mean by overdeterrence), the liability to which they will be subject if through a lapse of diligence they violate the law. Also, it is bad policy to encourage people harmed in some natural or financial disaster to cast about for someone on whom to lay off the consequences who had, however, committed only a technical breach of duty. *Bastian v. Petren Resources Corp.*, *supra*, 892 F.2d at 685; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, p. 282 (5th ed. 1984). The legal system is busy enough without shouldering the burden of providing insurance against business risks. Had Hashim diversified his investments, he would not have taken such a big hit when the Houston real estate market collapsed.

Estock argues that the distinction between transaction causation and loss causation makes more sense in securities cases than in real estate cases. But that is not the law. The requirement of proving loss causation is a general re-

quirement of tort law. See, e.g., *Spiegel v. Sharp Electronics Corp.*, 466 N.E.2d 1040, 1044 (Ill. App. 1984); *National Credit Union Administration v. Michigan National Bank*, 771 F.2d 154, 157-59 (6th Cir. 1985). It is more commonly invoked in cases involving a statutory rather than a common law duty of care, see *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 237-38 and n. 3 (2d Cir. 1996); Keeton et al., *supra*, § 43, p. 281, but it is not limited to statutory cases, see *Restatement (Second) of Torts*, *supra*, § 281, comments e and f, and we cannot think of any reason why it should be. Even the authors of the Prosser treatise, though critical of the rule in general, Keeton et al., *supra*, § 43, pp. 281-82, do not criticize its application in fraud cases, *id.*, § 110, p. 767, to which the present case, involving as it does alleged breach of fiduciary duty and negligent misrepresentation, is kin. And we cannot begin to see why the securities market and the real estate market should be distinguished. The Houston commercial real estate market crashed as surely in the early 1980s as the stock market crashed in 1929 or 1987, and no one supposes that the First National Bank of Chicago had undertaken to insure Estock against such a catastrophe. This case involves breach of contract as well as tort, but we do not understand Estock to be arguing that contract law provides a more generous measure of damages. On the contrary, consequential damages are more difficult to obtain in a breach of contract suit than in a tort suit.

This case is actually weaker for damages than either *Gorris* or our hypothetical securities-fraud case. In *Gorris*, we know, the sheep would have been saved, however adventitiously, had the defendant complied with its statutory duty. In the securities-fraud case, the investor's money would have been saved had he not bought from the defendant, because the change in market conditions that made the price of the stock fall was specific to the defendant's company. The market crash that wiped out Estock's investment was city-wide and could easily have wiped out

an alternative investment that Estock would have made in Houston had the deal negotiated by the bank fallen through. Estock does not deny that in 1980 Houston seemed an attractive place in which to invest in commercial real estate.

What is even more likely is that Estock would have bought the same building, only at a lower price, had the bank exercised due care. But this means that Estock's entire investment would still have been lost, albeit that investment would have been smaller. In short, it is far from clear that the $3.3 million that the jury awarded Estock is a loss that would have been averted had the bank been careful (whether or not as a result Estock would have decided not to buy the building), let alone a loss that satisfies the criterion of loss causation. But we shall pass the "but for" issue for the moment and focus on the loss-causation issue.

That issue is whether, had it not been for the bank's carelessness, the building would have retained any of the value that Estock was led to believe that it had at the time of the purchase. Estock concedes that by 1983 the Houston commercial real estate market was in terrible shape. Average vacancy rates were in the high 30s (percent); that too is conceded. By 1985, many office buildings in the Houston area had lost value. Perhaps some of these had structural defects, too; yet it is entirely implausible and unproven that defects which could have been repaired for under $100,000 caused the value of Estock's building to plunge from $5.1 million to $2.8 million (the price at which the mortgagee bought the building at the foreclosure sale). We recognize that for want of a nail a kingdom can be lost. Estock argues that the bank's failure to correct the defects scared tenants away. But the record belies this. The building's vacancy rate was little if any higher than the average vacancy rate for Houston office buildings. Estock argues that the bank had a duty to sell the property in 1982, when it realized that it had overestimated its earnings. But the

correction of the overestimate would have depressed the sale price; so a sale, with all the transaction costs entailed thereby, would not—except in hindsight—have benefited Estock. The bank can hardly be faulted, moreover, for failing to foresee in 1982 the collapse of the market that occurred in 1984 and 1985; apparently no one else foresaw it either. Had the collapse been generally foreseen, the building could not have been sold for any more in 1982 than in 1985—who would have bought it for more, knowing what lay ahead?

We are not the finders of fact, but it is our job to determine whether there was enough evidence to warrant a reasonable jury in finding that, had the bank acted throughout with due care, Estock would not have lost $3.3 million or some other definite amount. There was not. There was no evidence of what the building would have been worth in 1985, when Estock was wiped out by the foreclosure, had the bank exercised due care in acquiring and operating the property. For all that appears, it would not have been worth a cent more than $2.8 million, in which event Estock would have lost its entire investment anyway.

Even so, Estock might have been able to prove an entitlement to some damages. It would have had to put on a witness who would value the property on the date of purchase on the assumption that the net income had been correctly calculated and the structural defects repaired. Suppose the property could have been bought for only $4 million (almost certainly too low, but the precise figure doesn't matter) had the bank done its job. We know that five years later the building was worth $2.8 million. So if Estock had paid only $4 million for the building, it would not have lost $3.3 million when the mortgagee foreclosed; for it would not have had as much to lose if it had paid only $1.1 million ($4 million minus $2.9 million, the amount of the mortgage) rather than $2.2 million for the building. Suppose that on the assumption of a purchase price of $4 million Estock would have lost only $2.3 mil-

lion in the crash. Then the damages recoverable in this suit would be $1 million—the difference between the loss that Estock would have sustained had the bank acted with due care (enabling Estock to buy the building at a lower price), which we are assuming to be $2.3 million, and the larger loss that it actually sustained ($3.3 million).

The plaintiff did not take this approach to calculating damages. It did not ask the jury to separate the losses due to the bank's errors from the losses due to the collapse of the commercial real estate market. The jury was correctly instructed on the difference between transaction causation and loss causation, but the plaintiff limited its damages case to the former. The judgment must therefore be reversed with directions to enter judgment for the defendant. Technically, the plaintiff is entitled to a judgment for nominal damages, because it proved a breach of contract, *Hentze v. Unverfehrt*, 604 N.E.2d 536, 540 (Ill. App. 1992); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995); but for obvious reasons it is not seeking such a judgment.

This result may seem very harsh. It may seem obvious that Estock lost something—at the very least, the $66,000 that it eventually paid to correct the foundation subsidence problem that the bank had overlooked. But it may not have lost this money as a result of the bank's misconduct but only as a result of the collapse of the Houston real estate market. The foreclosure sale fetched only $2.8 million. Suppose that Estock had not bothered to repair the foundation and that as a result the foreclosure sale had fetched only $2.734 million ($2.8 million – $66,000). Estock would have been no worse off, because the price at the foreclosure was lower than the unpaid balance of the mortgage—which means that it gained nothing from the expenditure of the $66,000. It was throwing good money after bad. (In contrast, if the unpaid balance of the mortgage had been only $1 million, Estock would have recovered the expenditure in the higher price at the foreclosure

sale.) It is possible, even likely, that if the bank had done its work properly, Estock would have gotten the building at a lower price and so would have lost less in the collapse. But remember, it did not attempt to calculate its damages on this basis. It went for the big bucks in this suit now shockingly in its twelfth year. It tried to recover for a loss caused by extraneous economic conditions. It forewent the opportunity to prove a smaller loss but one recoverable under the law of damages, which was not drafted by Santa Claus.

In light of this disposition of the bank's appeal, the cross-appeal (including Movitz's conditional appeal) is moot.

JUDGMENT REVERSED, CROSS-APPEAL DISMISSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LOUIS A. MOVITZ, as Trustee,
AND ESTOCK CORPORATION, N.V.,

vs. No. 86 C 2696

THE FIRST NATIONAL BANK
OF CHICAGO

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff, Estock Corporation and against Defendant, First National Bank of Chicago in the amount of $3,284,665.

Date April 2, 1997

H. Stuart Cunningham
Clerk

/s/
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 86 C 2696 Date: April 2, 1997

Name of Assigned Judge: Charles R. Norgle, Sr.

Case Title: LOUIS A. MOVITZ, as TRUSTEE, AND ESTOCK CORPORATION vs. FIRST NATIONAL BANK OF CHICAGO

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Plaintiffs' motion for entry of judgment is granted. Motion for mistrial Doc. #603 was and is denied. Motion for directed verdict at the close of evidence Doc. #607 was and is denied. Enter judgment on the verdict.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 86 C 2696 Date: September 26, 1997

Name of Assigned Judge: Charles R. Norgle, Sr.

Case Title: Movitz v. First National Bank of Chicago

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry]
Before the court is Defendant, First Chicago's Motion for Judgment as Matter of Law or, in the alternative, for a new trial. For the reasons stated on the reverse side, the motion is denied.

/s/ Charles R. Norgle, Sr.

(11) ☒ [For further detail see ☒ order on the reverse of * * * the original minute order form.]

* * * * *

[Reverse Side]

ORDER

In determining whether the court should grant the Defendant's motion for judgment as a matter of law, the court must "examine the evidence presented, combined with any reasonably drawn inferences, and determine whether that evidence sufficiently supports the

verdict when viewed in the light most favorable to the non-moving party." *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997); *see also Willis v. Marion County Auditor's Office*, 118 F.3d 542, 545 (7th Cir. 1977); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 515 (7th Cir. 1993). A motion for judgment as a matter of law should be granted only if the court finds that no rational jury could have found for the Plaintiff based on the trial evidence. *Tincher*, 118 F.3d at 1129.

In the alternative, Defendant moves for a new trial. The court has discretion to grant a new trial if "the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1367 (7th Cir. 1996) (*quoting McNabola*, 10 F.3d at 516); *see also Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1997).

After careful review of the pleadings and the trial evidence, the court finds that there was sufficient evidence presented to support the jury's verdict, in its entirety. The court notes that the Defendant was well represented during the trial, and had ample opportunity to be heard. As such, the court denies the Defendant's motion.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

August 25, 1998

Before

Hon. Richard A. Posner, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. John L. Coffey, Circuit Judge

Nos. 97-3761 and 97-3818

LOUIS A. MOVITZ, as Trustee,
and ESTOCK CORPORATION, N.V.,

Plaintiffs-Appellees, Cross-Appellants,

v.

FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 2696—Charles R. Norgle, Sr., *Judge*.

ORDER

On July 21, 1998, plaintiffs-appellees filed a petition for rehearing with suggestion for rehearing *en banc* and on August 12, 1998, defendant-appellant filed a answer. All judges on the original panel have voted to deny the

petition, and none of the active judges* has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

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* Hon. Walter J. Cummings and Hon. Ilana Diamond Rovner did not participate in the consideration of the petition.